NO. 89549-0

SUPREME COURT
OF THE STATE OF WASHINGTON

WASHINGTON FEDERAL SAVINGS,

Petitioner,

v.

MICHAEL P. KLEIN, Personal Representative
of the Estate of ROBERT KLEIN, Deceased,

Respondent.

MEMORANDUM OF AMICUS CURIAE WASHINGTON BANKERS ASSOCIATION IN SUPPORT OF PETITION FOR REVIEW

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I. STATEMENT OF INTEREST OF AMICUS CURIAE

Washington Bankers Association ("WBA") is a Washington nonprofit corporation and is the trade association for banks of all sizes doing business in Washington. WBA engages in advocacy for its members and education of members' employees, among many other services. WBA's members are or will be creditors with claims in the estates of deceased borrowers and are therefore likely to be entitled to "actual notice" by estates under RCW 11.40.020. WBA's members stand in a position similar to that of Washington Federal, N.A. ("Washington Federal") with respect to the Estate of Robert Klein.

WBA's members therefore have a strong industry-wide interest in both the outcome of this probate dispute and its rationale in order to have clarity with respect to what constitutes "actual notice" under Washington probate law and how, if at all, they can protect their interests as creditors of an estate. Moreover, they have a strong concern about how the resolution of the proof-of-mailing dispute in this case may affect notice provisions in other statutes and proof of mailing at common law.

II. STATEMENT OF ISSUE PRESENTED FOR REVIEW

WBA supports the Statement of Issue as framed by Petitioner Washington Federal in its Petition for Review in this matter (the "Petition"). In addition, the arguments of both the Petition and the Answer of Respondent Michael P. Klein, as personal representative of the Estate of Robert Klein ("Klein"), address the adequacy of Klein's

evidence of mailing in this case in the context of whether statutory "actual notice" was given. *See* Petition at 11 n.2, 14, 15 n.3, 18; Answer at 11 n.4, 12-13 & n.6, 16, 19-20. WBA believes this point is inseparable from the standard for rebutting the presumption of mailing and its importance should be explicitly recognized.

III. STATEMENT OF THE CASE

WBA generally adopts the Statement of the Case presented by Washington Federal in the Petition. WBA would also like to correct a statement made in the Answer that Washington Federal "did not file and serve its creditor's claim until one year after it *received* notice from the PR." *See* Answer at 6 (emphasis added) (appearing to cite Jan. 7, 2010, publication date as date of "receipt" of notice). This is a distraction, because the published notice gave the bank a two-year period for filing. The question is whether Washington Federal was required to file its claim within 30 days of the alleged mailing of the January 28, 2011, letter.

IV. ARGUMENT

Review of the decision below is important not only for the three reasons identified by Washington Federal but also because the decision is in conflict with decisions of the Supreme Court (RAP 13.4(b)(1)). All four of these considerations under RAP 13.4(b) are addressed below.

A. The Decision in *Washington Federal* Is in Conflict with Supreme Court Decisions in Notice-by-Mailing Cases.

The Court may take notice, through a simple database search, that the term "actual notice" is used in more than 50 Washington statutes and

over 300 of this Court's decisions. A cursory review of the citations will show that "actual notice" does not have a fixed meaning. The Court often uses the term to signify actual receipt of notice. *See, e.g., Black v. Dep't of Labor & Indus.,* 131 Wn.2d 547, 550, 553 n.5, 933 P.2d 1025 (1997). The Court has also distinguished "actual notice" from "mailed notice," implying that "actual notice" does not contemplate constructive notice. *See Duskin v. Carlson,* 136 Wn.2d 550, 557, 965 P.2d 611 (1998).

The statute in this case, RCW 11.40.020(1)(c), combines the terms "actual notice" and "mailed notice" by saying that a personal representative may "give actual notice to creditors . . . by . . . mailing the notice to the creditor." The court below interpreted this language as no different from "notice by mailing" and as requiring only that the "mailing" by the personal representative be established. *Wash. Fed. Sav. v. Klein,* 311 P.3d 53, 56 ¶ 20 (Wn. App. 2013). Proof of the creditor's actual receipt of the notice is not required. *Id.*

Accepting for the sake of argument that this much of the decision is correct, the issue remains, as presented by Washington Federal in its Petition: What are the standards for proving and challenging the proof of "mailing?" On the surface, the court of appeals acknowledged that the personal representative must establish a *prima facie* case that he or she accomplished the mailing in the manner prescribed by statute. *Id.* at 57 ¶

30. But the court departed, without any authority, from the settled Washington law on resolving questions of "mailing" under this Court's precedents. The point of this body of law is to accomplish, to the extent reasonably possible under the circumstances, that *receipt* does in fact occur. Evidence of non-receipt is inherently relevant to this question.

At least since *Avgerinion v. First Guaranty Bank,* 142 Wash. 73, 252 P. 535 (1927), this Court has held that use of the government mails will presumptively result in receipt of the mailing by the addressee, and this presumption "is sufficient to justify a finding that such is the fact, in the absence of *anything* to the contrary." *Id.* at 78 (emphasis added) (citing *Rosenthal v. Walker,* 111 U.S. 185, 4 S. Ct. 382, 28 L. Ed. 395 (1884)). The *prima facie* proof of delivery to the post office "may be made by showing (a) an office custom with respect to mailing; (b) compliance with the custom in the specific instance." *Farrow v. Dep't of Labor & Indus.,* 179 Wash. 453, 455, 38 P.2d 240 (1934) (citing Wisconsin case). *See also Matsko v. Dally,* 49 Wn.2d 370, 376-77, 301 P. 2d 1074 (1956) (applying this standard of proof in a contracts case).

Instead of addressing the argument Washington Federal made on this point below, *see* App. Reply Br. at 13-17, the court of appeals asked a series of rhetorical questions:

> To prove mailing in accordance with RCW 11.40.020(c) [sic], if it is not enough for a legal assistant to say that she "caused" actual notice to be given by mailing, then what is enough? Must she say that she personally took the document to the mail room? Or that she personally put it on the mail truck or in an official postbox?

Washington Federal, 311 P.3d at 57 ¶ 29. The court's answer was, "No." *Id.* But in fact the Supreme Court's decisions on this point say, "Yes, if those steps represent the office custom." The party responsible for notice must show what its customary procedures were for delivery of mail to the Postal Service *and* that the party complied with them.

The court below offered no reason whatsoever for abandoning this template for establishing the presumption or overcoming it. Given that RCW 11.40.020(1)(c) prescribes the mailing requirement in the most ordinary terms—"mailing to . . . the creditor's last known address, by regular first-class mail, postage prepaid"—there is nothing in the statutory text to justify departing from this Court's template of proof of mailing. Moreover, the statutory text in this case provides for exactly the kind of mailing that is used in countless government and private communications not governed by this statute. The decision below therefore threatens to unravel the law on notice-by-mailing far beyond the cases governed by RCW 11.40.020.

B. The Decision in *Washington Federal* Is in Conflict with the Court of Appeals' Decisions in *Tassoni* and *Automat v. Yakima County.*

WBA agrees with Washington Federal that the court of appeals' decision in *Washington Federal* is in conflict with its prior decision in *Tassoni v. Department of Retirement Systems*, 108 Wn. App. 77, 29 P.3d 63 (2001), and merits review under RAP 13.4(b)(2). WBA would identify the core of this conflict in terms similar to the argument of Washington Federal, as well as take issue with positions taken by Klein in the Answer.

The conflict existing between these two cases centers around the critical issue whether evidence of the non-receipt of notice may be used to rebut the presumption of mailing. The opinion in *Tassoni* invoked the standard Washington template for the proof of giving notice by mail. *See id.* at 86 (citing *Kaiser Aluminum & Chem. Corp. v. Dep't of Labor & Indus.*, 57 Wn. App. 886, 890, 790 P.2d 1254 (1990)). The court reviewed the evidence that the notices required from the Department of Retirement Systems were never received by either the government employee or his employer (DSHS), which was also a required addressee. *Id.* at 82-83, 87. The court then concluded, "Tassoni and his employer rebutted any presumption that the notice was mailed." *Id.* at 87.

Klein responded to the Petition's argument on the conflict with *Tassoni* by saying that *Tassoni* did not interpret the probate statute or deal with a probate claim. *See Answer* at 10-11. Klein claims that RCW 11.40.020(1)(c)'s "actual notice" provision concerning mailing is "more specific guidance" than the situations governed by the common-law

"mailbox" rule represented by *Avgerinion, Farrow, Matsko, Kaiser,* and *Tassoni. See* Answer at 11. But this is incorrect. There is nothing special about first-class mail.

The court's decision below is also inconsistent with *Automat Co., Inc. v. Yakima County,* 6 Wn. App. 991, 497 P.2d 617 (1972). That case dealt with a requirement of the personal-property-tax laws that county assessors "mail a notice to all such persons [those liable for personal property tax] at their last known address" that they must submit a listing of personal property. RCW 84.40.040, *quoted in Automat,* 6 Wn. App. at 993. This standard is almost identical to RCW 11.40.020(1)(c). The court applied the standard common-law rule regarding creation of the presumption of mailing. *Id.* at 995 (citing *Farrow* and another case). The court also recited the evidence presented by the taxpayer that it did not receive the notice, *id.* at 993-94, and noted that the trial court accepted the testimony and assessed its credibility. *Id.* at 996 (upholding trial court's determination to give greater credit to assessor).

In contrast, the court below in *Washington Federal* refused to engage the bank's evidence at all, 311 P.3d at 56 ¶ 20, even though, in the CR 56 context, as opposed to trial, Washington Federal was entitled to all reasonable inferences from its evidence. *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002). Non-receipt of the notice is a very reasonable inference from that evidence. To let this inconsistency with *Automat* persist would have potentially far-reaching consequences.

C. This Dispute Involves a Significant Question of Law under the Due Process Clause of the Constitution of the United States.

WBA agrees with Washington Federal that this case involves a significant question of law under Due Process and that review by this Court is warranted under RAP 13.4(b)(3). In addition to the Petition's argument on this point, *see* Petition at 11-16, WBA submits that the danger of a de facto "irrebuttable presumption," identified in the Petition at page 15, needs to be tested by whether it is rational to presume receipt by the addressee based solely on evidence controlled by the estate.[1]

"Actual notice" to estate creditors is required under Due Process in order to "afford them an opportunity" to present their claims. *Tulsa Prof'l Collection Servs. v. Pope,* 485 U.S. 478, 484, 108 S. Ct. 478, 99 L. Ed. 565 (1988) (quoting *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 314, 70 S. Ct. 652, 94 L. Ed. 865 (1950)). The Legislature may create a conclusive rule of evidence on notice, but "there must be a rational connection between the facts declared" and the fact presumed. *Adams v. Hinkle,* 51 Wn.2d 763, 786, 322 P.2d 844 (1958). It is a substantial question, in the context of potentially self-serving estate administration, whether it is "rational" to conclusively presume the fact of

[1] Klein's position on whether the court created an irrebuttable presumption is, "So what?" Klein suggests that, because the Legislature does not expressly create a rebuttable presumption in the language of RCW 11.40.020, then one does not exist. *See* Answer at 11 n.5. Klein also says that Washington Federal could have challenged the affidavit of mailing concerning the notice through discovery. *See* Answer at 16. This would have involved exactly the questions that the court of appeals thought were absurd. *See Washington Federal,* 311 P.3d at 57 ¶29 (quoted above at page 5). Application of the common-law rule on mailing would avoid this detailed discovery in most cases.

receipt based on a bare statement that the sender mailed the notice, which may be challenged only by disproving the veracity of the declarant.

D. This Dispute Involves Issues of Substantial Public Interest That Should Be Determined by This Court Because They are Issues that Affect Almost Every Probate in the State of Washington and Potentially Apply in Many Other Circumstances.

The issues involved in *Washington Federal* are of substantial public interest and merit decision by this Court pursuant to RAP 13.4(b)(4) for many reasons.

First, the decision below will significantly impact every Washington probate estate with reasonably ascertainable creditors. The issue is of great concern to estates, as shown by the motions of Klein and the non-parties to publish the decision below, *see* Petition, Apps. B & C, as well as by the court's granting the motions. *See id.,* App. D.

On the other side of this coin, under the court's decision, the mail-receipt and mail-logging procedures of estate creditors are suddenly worthless for any challenge to the presumption of receipt based on mailing (if any realistic possibility of such a challenge remains at all). Estate creditors should not bear the entire risk of mail failure both at the Postal Service and at the offices of personal representatives. Mail-receipt and logging procedures are widespread, well established, and understandably reliable. Before the Washington courts force lenders to rework their nationwide, careful procedures to satisfy unique Washington requirements—costs inevitably passed on to borrowers—this Court should

address directly whether the common-law rules regarding notice by mailing inhere in the "actual notice" procedure of RCW 11.40.010(1)(c).

Second, the decision below has no limiting principle. It interpreted a straightforward, first-class mailing procedure under a statute and held that the intended recipient cannot attempt to rebut the presumption of receipt through its own evidence of non-receipt. If the courts take *Washington Federal* seriously, the existing common-law rule is jeopardized. On the other hand, if the courts arbitrarily limit *Washington Federal* to probate claims, it would produce an irrational incoherence in proof-of-mailing standards and possibly lead both public and private entities to adopt needlessly and potentially expensive duplicative procedures for monitoring mail.

These issues merit the Court's attention.

V. CONCLUSION

For the foregoing reasons, WBA requests that the Court grant the Petition for Review.

RESPECTFULLY SUBMITTED this 7th day of January, 2014.

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